

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO

HUSKY DRILLING, INC., and  
TREVOR HERRERA,

02 SEP -6 AM 11:34

Plaintiffs,

v.

CV-01-1205 ~~WWD~~/RLP-ACE

*MCA*

VALLEY FORGE INSURANCE COMPANY,  
a foreign corporation, and CNA INSURANCE COMPANY,  
a foreign corporation,

Defendants.

PLAINTIFFS' MOTION TO STRIKE THE TESTIMONY OF  
DEFENSE EXPERT TONY SCHRADER, ESQ. FOR HIS WILLFUL FAILURE  
TO ATTEND HIS OWN TIMELY NOTICED DEPOSITION OR IN THE  
ALTERNATIVE  
AN AWARD OF RULE 37(D)SANCTIONS

Plaintiffs, by and through their attorneys of record, Vigil & Vigil, P.A. hereby  
move the Court for the entry of an order excluding the trial testimony of Defense  
expert Tony Schrader, Esq., or in the alternative an award of discovery sanctions  
pursuant to Fed. R. Civ. P. 37(d) for Mr. Schrader's failure to appear at his deposition  
scheduled on August 17, 2002 in Austin, Texas, his place of residence. In support of  
their Motion, Plaintiffs state as follows:

1. Defense expert Tony Schrader's deposition was timely noticed and originally scheduled for Friday, August 16, 2002, in Austin Texas. See Exhibit "A" attached hereto. All travel accommodations were scheduled and an airplane ticket was purchased for Ms. Vigil to fly out on Thursday

morning on August 15, 2002.

2. A few days before the scheduled deposition, counsel for Plaintiffs were informed that Mr. Schrader's deposition would need to be moved to Saturday, August 17, 2002. Plaintiffs were more than accommodating to this request and set out immediately to find a new site in Austin for the deposition which could accommodate Mr Schrader, as well as, an available court reporting firm open on a Saturday to record deposition.  
*See Exhibit "B" attached hereto.*
3. On Thursday morning, August 15, 2002, at approximately 10:15 a.m. defense counsel Pat Allen, telephoned Plaintiffs' office and informed Ms. Lucero that Mr. Schrader would not be able to attend his deposition after all. The reason given was that he was testifying all week in federal court and could not be present in his own home town to sit for his deposition on Saturday. Ms. Vigil was already on a plane taxiing the run way when Mr. Allen called. Ms. Lucero had no way of reaching her until she arrived in Austin later that afternoon.
4. Plaintiffs are substantially prejudiced by this inappropriate last minute cancellation of an expert deposition. No reason exists that Mr. Schrader could not be available for his deposition, particularly since it was scheduled to take place in his own home town. Accordingly, Mr. Schrader should be excluded from testifying at trial based on his willful

failure to appear for his timely noticed and re-noticed deposition.

5. In the alternative, if this Court does not strike Mr. Schrader's testimony, Defendant CNA's action in failing to timely produce their expert witness, Mr. Schrader, for his appropriately noticed deposition, warrants the imposition of sanctions pursuant to Fed. R. Civ. P. 37(d)(allowing sanctions for failure to appear and answer questions at deposition after being served with proper notice).
6. Mr. Schrader's refusal to appear at his deposition caused a great inconvenience and expense to Plaintiffs. Ms. Vigil lost two full days out of the office, as well as the cost of the wasted trip.
7. CNA should be sanctioned in an amount and to an extent that they will not repeat this type of behavior. Counsel respectfully requests that under Rule 37(d) the court require that Defendants pay the resulting travel expenses of Plaintiffs' counsel, including a reasonable attorney fee. See *Hyde & Drath v. Baker*, 24 F.3d 1162 (9<sup>th</sup> Cir. 1994)(Holding "the court must require that the party failing to participate in discovery and/or the party's attorney pay the resulting expenses of the other party, including a reasonable attorney fee.") Ms. Vigil's last hourly rate approved by the court for her work in a bad faith case was \$235.00/per hour. Mr. Schrader cost her and the Vigil & Vigil, P.A. two full eight hour days out of the office. At the approved hourly rate, the firm has lost \$3,760.00.

Ms. Vigil should be compensated by Defendant CNA for the cost of the airline ticket (\$283.50) and Ms. Vigil's lost time from the firm. *See Exhibit "C" attached hereto (cost of ticket)*

8. Counsel for Defendant CNA has been contacted regarding repayment of Ms. Vigil's expenses and reasonable attorney's fees and refuses to provide payment for these expenses. *See Exhibit "D" attached hereto (Letter to Mr. Allen and response from Mr. Allen).*

WHEREFORE, Plaintiffs respectfully request the Court enter an Order excluding the trial testimony of expert witness Tony Schrader, Esq. or in the alternative an award of sanctions for this willful abuse of the discovery rules.

Respectfully submitted,

VIGIL & VIGIL, P.A.  
2014 Central Ave., S.W.  
Albuquerque, New Mexico 87104  
(505) 243-1706

Amalia S. Lucero  
LISA K. VIGIL  
AMALIA S. LUCERO  
Attorneys for Plaintiffs

I hereby certify that a true and correct copy of the foregoing pleading was forwarded by regular mail to opposing counsel of record this 6th day of September, 2002.

Amalia S. Lucero  
Amalia S. Lucero, Esq.

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO

HUSKY DRILLING, INC.,  
and TREVOR HERRERA,

Plaintiffs,

vs.

Civil No. 01-1205 WWD/RLP

COPY  
COC

VALLEY FORGE INSURANCE COMPANY,  
a foreign corporation, and CNA INSURANCE  
COMPANY, a foreign corporation,

Defendants.

NOTICE OF ORAL VIDEO TAPEd and STENOGRAPHIC DEPOSITION  
DUCES TECUM

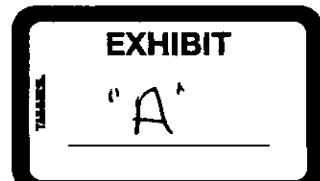
TO: Tony Schrader, P.C.  
c/o Patrick Allen, Esq.  
Attorneys for Valley Forge Insurance  
Company, et al.  
5100 Indian School Rd., NE  
Albuquerque, New Mexico 87110

PLEASE TAKE NOTICE that the Plaintiffs will take the oral deposition of Tony Schrader, said deposition to take place on Friday, August 16, 2002, at 11:30 a.m. at the Texas Bar Center, 1414 Congress Avenue, in Austin, Texas.

Pursuant to LR-CV30.1, you are further advised that this deposition will be recorded by a certified court reporter and videographer from Digital Deposition Services.

The Deponent should please bring with him to the deposition the following:

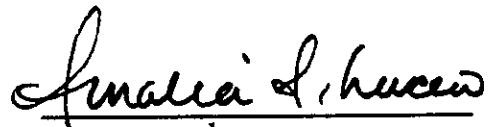
1. All documents in his possession or control received, reviewed or created by him related to this lawsuit.



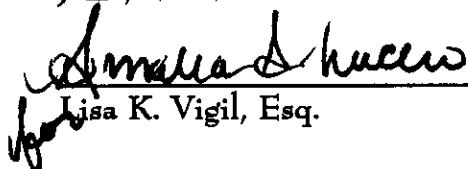
2. All billing and time records for services performed related to this lawsuit.
3. A copy of his current curriculum vitae.
4. All material that he reviewed or that he relied upon in forming his opinions in this lawsuit.
5. A list of all depositions in which he has previously been deposed.
6. A copy of all research into the cases, any law review articles read or relied upon in formulating an opinion, and any other sources.
7. A copy of all writings or articles authored by deponent as referred to in your report.
8. Please provide all 1099's from all insurance companies that have paid you over the last five years.
9. Please provide all billings to insurance companies or their lawyers for the last five years.

Plaintiff intends that the deposition may be used at trial pursuant to Rule 30 of the Rules of Civil Procedure for the United States District Courts.

VIGIL & VIGIL, P.A.

  
Lisa K. Vigil  
By: *for* Attorneys for Plaintiff  
2014 Central Avenue SW  
Albuquerque, New Mexico 87104  
Telephone: (505) 243-1706  
Facsimile (505) 842-1848

I hereby certify that I have faxed and  
mailed the foregoing pleading to all  
counsel of record this 28<sup>th</sup> day of  
June, 2002.

  
Lisa K. Vigil, Esq.

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO

HUSKY DRILLING, INC.,  
and TREVOR HERRERA,

Plaintiffs,

vs.

Civil No. 01-1205 WWD/RLP

VALLEY FORGE INSURANCE COMPANY,  
a foreign corporation, and CNA INSURANCE  
COMPANY, a foreign corporation,

Defendants.

AMENDED

NOTICE OF ORAL VIDEO TAPEd and STENOGRAPHIC DEPOSITION  
DUCES TECUM

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TO: Tony Schrader  
c/o Patrick Allen, Esq.  
Attorneys for Valley Forge Insurance  
Company, et al.  
5100 Indian School Rd., NE  
Albuquerque, New Mexico 87110

PLEASE TAKE NOTICE that the Plaintiffs will take the oral deposition of  
Tony Schrader, said deposition to take place on Saturday, August 17, 2002, at 2:00  
p.m. at Esquire Deposition Services, 3101 Bee Caves Road, Suite 220, in Austin, Texas.

Pursuant to LR-CV30.1, you are further advised that this deposition will be recorded  
by a certified court reporter and videographer from Esquire Deposition Services.

The Deponent should please bring with him to the deposition the following:

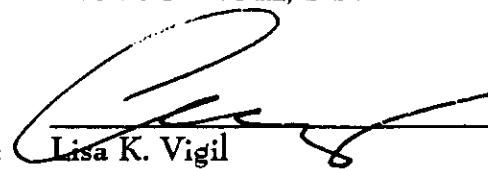
1. All documents in his possession or control received, reviewed or created by  
him related to this lawsuit.



2. All billing and time records for services performed related to this lawsuit.
3. A copy of his current curriculum vitae.
4. All material that he reviewed or that he relied upon in forming his opinions in this lawsuit.
5. A copy of every deposition he has given.
6. A copy of a document, pleading or piece of correspondence that lists the full caption for every CNA company lawsuit that you have participated in as an expert witness.
7. A list of all depositions in which you have previously been deposed.
8. A copy of all research into the cases, any law review articles read or relied upon in formulating an opinion, and any other sources.
9. A copy of all writings or articles authored by deponent as referred to in your report.
10. Please provide all 1099's from all insurance companies that have paid you over the last five years.
11. Please provide all billings to insurance companies or their lawyers for the last five years.

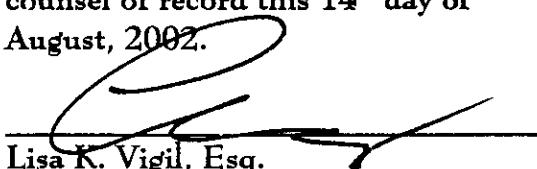
Plaintiff intends that the deposition may be used at trial pursuant to Rule 30 of the Rules of Civil Procedure for the United States District Courts.

VIGIL & VIGIL, P.A.

By:   
Lisa K. Vigil

Attorneys for Plaintiff  
2014 Central Avenue SW  
Albuquerque, New Mexico 87104  
Telephone: (505) 243-1706  
Facsimile (505) 842-1848

I hereby certify that I have faxed and  
mailed the foregoing pleading to all  
counsel of record this 14<sup>th</sup> day of  
August, 2002.

  
Lisa K. Vigil, Esq.

SALES PERSON: 65  
CUSTOMER NBR: 010285ITINERARY/INVOICE NO. 0301986  
EZWRTHDATE: 12 JUL 02  
PAGE: 01TO: LAW OFFICE OF ~~VIGIL & VIGIL PA~~  
~~100 14TH ST SW 20414 CENTRAL SW~~  
ALBUQUERQUE NM 87102**BOLACK**  
TOTAL • TRAVEL6916 Montgomery, N.  
P.O. Box 9095  
Albuquerque, N.M.  
87199-095  
(505) 881-1119  
Fax (505) 346-1119  
www.bolack.coDURING BUSINESS HOURS CALL BOLACK • • • Wats 1-800-258-1421  
FOR 24 HR. EMERGENCY TRAVEL ASSISTANCE CALL • • • 1-800-358-18FOR: VIGIL/LISA  
VIGIL/ZANE

\*\*\*\*\*PLEASE VERIFY YOUR TRAVEL RESERVATIONS\*\*\*\*\*  
 \*\*\*\*\*DISCREPANCIES MUST BE MODIFIED WITHIN\*\*\*\*\*  
 \*\*\*\*\*24 HOURS OF TICKETING TO AVOID PENALTIES\*\*\*  
 \*\*\*\*\*505-881-1198 OR 1-800-258-1424\*\*\*\*\*  
 \*\*\*\*\*CHECK IN AT LEAST 2 HRS PRIOR TO DEPARTURE\*\*\*  
 \*\*\*\*\*TRAVEL AGENCY ITINERARY REQUIRED AT CHECK IN\*\*\*

OTHER  
15AUG THU ALBUQUERQUE AIRFARE NONREFUNDABLE 283.50 PER PERSON  
567.00 TOTAL

OTHER ALBUQUERQUE NONREFUNDABLE SERVICE FEE 44.50

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CAR AUSTIN HERTZ RENT A CAR INTER CAR AUTO A/C  
PICK UP-205P  
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RATE PLAN 3 DAYS 0 HRS USD FREE MI/KM EX MI/KM  
DAILY 26.09 UNL  
EXTRA DAY- 57.59 UNL  
EXTRA HOUR- 13.05 UNL  
MANDATORY CHARGES 31.74  
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AR ALBUQUERQUE 425P

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ITINERARY  
ACCEPTED BY: \_\_\_\_\_

DATE: \_\_\_\_\_

**EXHIBIT**

C

**VIGIL & VIGIL**  
A Professional Association

ATTORNEYS AT LAW

CENTRAL LAW BUILDING

2014 Central Avenue Southwest  
Albuquerque, New Mexico 87104

TELEPHONE: (505) 243-1706  
FACSIMILE: (505) 342-1848

JACOB G. VIGIL  
LISA K. VIGIL  
AMALIA S. LUCERO

August 21, 2002

Patrick Allen, Esq.  
YENSON, LYNN, ALLEN & WOSICK, P.C.  
P.O. Box 26447  
Albuquerque, NM 87125-6447

Dear Counsel;

As you know, it has been an enormous and expensive inconvenience for Tony Shrader to refuse to attend his deposition in his home town, set first for August 16, 2002 and then moved to accommodate him to August 17, 2002. Because of the original scheduling, my flight was set to leave at 10:15 a.m. on Thursday. It was as my plane was lifting off Thursday morning that Amalia Lucero, my associate, got the call that Mr. Shrader would not be coming to his deposition.

I would not have spent two days out of my office had I known that Mr. Shrader's deposition was not going to be taking place. The cost to my firm for my absence was much greater than the cost of my airline tickets. I have sent a copy of my itinerary to you for immediate reimbursement of my airline tickets (\$283.00). As you know, my sister lives in Austin, so I did not have lodging expenses, but I cannot stress the inconvenience of being in Austin unnecessarily. Lugging 30 pounds of unnecessary paperwork across states is not a vacation, nor is trying to run my office out of town.

My last hourly rate approved by the court for my work in a bad faith case was \$235.00/hour. Mr. Shrader cost me two full days out of my office. I work well over an eight hour day. At my last approved rate for two, eight hour days, my firm has lost \$3,760.00. I will expect CNA (or Mr. Shrader) to compensate my firm for the cost of my airline ticket and my lost time from the firm.



Additionally, I will expect Mr. Shrader to appear here for his deposition within the next two weeks.

Very truly yours,

**VIGIL & VIGIL, P.A.**



LISA K. VIGIL, Esq.

LKV/jm

**VIGIL & VIGIL**  
A Professional Association

ATTORNEYS AT LAW

JACOB G. VIGIL  
LISA K. VIGIL  
AMALIA S. LUCERO

CENTRAL LAW BUILDING  
2014 Central Avenue Southwest  
Albuquerque, New Mexico 87104

TELEPHONE: (505) 243-1706  
FACSIMILE: (505) 842-1848  
E-Mail: lisa@vigillawfirm.com

August 28, 2002

Via Facsimile Transmission

Patrick Allen, Esq.  
YENSON, LYNN, ALLEN & WOSICK, P.C.  
5100 Indian School Rd., NE  
Albuquerque, NM 87110

RE: *Husky Drilling et al v. Valley Forge et al*; Cause No. CV 01-1205 WWD/RLP

Dear counsel:

Following our prior discussion I have set Tony Schrader's deposition in September, to tie down the date. We need an answer whether CNA is going to meet the expenses I listed in my previous letter because Mr. Shrader refused to attend his deposition. Whether he was medically incapable or out for some other reason, my firm should not be suffering the brunt of his unavailability. I am trying to be very conciliatory by agreeing to again fly out to Austin, instead of requiring he appear here, because of his inability to fly, but require payment for the time out of the office due to his unavailability, in addition to the flight cost. Please provide me with a response by August 30, 2002.

Very truly yours,

VIGIL & VIGIL, P.A.

LISA K. VIGIL

LKV/pm

# Yenson, Lynn, Allen & Wosick, P.C.

A T T O R N E Y S A T L A W

*Terrance P. Yenson*

*Phyllis Savage Lynn*

*Patrick D. Allen*

*Joseph B. Wosick*

*Matthew A. Pullen*

*Gordon J. McCulloch,  
of counsel*

August 30, 2002

Lisa K. Vigil, Esq.  
Vigil & Vigil, P. A.  
2014 Central Avenue, S. W.  
Albuquerque, New Mexico 87104

Re: Husky Drilling, et al. v. Valley Forge, et al.  
CV-01-1205 WWD/RLP

Dear Lisa:

I am in receipt of your recent letters requesting reimbursement for time spent out of the office on August 15 and 16, 2002. While I regret the inconvenience of having to cancel Mr. Schrader's deposition at the last minute, I cannot agree to pay your hourly rate for time spent out of the office. First, as we have already discussed, I have agreed to reimburse you for your airfare to and from Austin. Second, you specifically told me that you spent Thursday and Friday waterskiing with your family who live in Austin, and I cannot imagine why you are asking me to pay for your recreational time. The fact of the matter is Mr. Schrader's deposition was moved to Saturday, August 17, and it was you who chose to leave your office two days early to enjoy time with your family. Third, there are numerous expenses we are having to incur in this case due to your failure to disclose witnesses and damages when you had an obligation to do so early in this case. Just as an example, Matt Pullen is having to redepose Trevor Herrera because of your prior refusal to provide information regarding damages. We certainly have a legitimate claim against you to pay for our additional time and expense in reconvening this deposition. Rather than quibble over these matters, I would suggest we both absorb our time and simply move forward with the lawsuit.

I am assuming that we are still on for Mr. Schrader's deposition on September 10. I will look forward to receiving your Notice of Deposition for that date. I look forward to seeing you in Austin on the 10<sup>th</sup>.

Sincerely,

YENSON, LYNN, ALLEN & WOSICK, P.C.

  
Patrick D. Allen

PDA:kab